No. 15502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOE WEISE and JAMES LESTER FRENCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

Honorable George H. Boldt, Judge.

APPELLANTS' REPLY BRIEF.

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Prefatory Statement.

The weakness of appellee's position is demonstrated, broadly, by its argument that the arrests, search and seizure were necessary as a matter of law enforcement convenience, and by the additional argument that "only search warrants" are the concern of the Fourth Amendment (App. Br. p. 6).

It is not difficult to understand why these untenable positions are urged. Appellee recognizes that no search warrant was obtained here, and makes no attempt to justify the search and seizure under such process. The only basis for the legality of the search and seizure is

appellee's claim that the agents' acts were "incidental to a lawful arrest". Appellee, however, is unwilling to have the lawfulness of the arrests measured by the high standards fixed by the Constitution and the decisions of the Supreme Court interpreting the fundamental law. This will explain the resort to the argument of "administrative convenience", a matter which appellants treat later.

With respect to the specifics of this case, appellee assumes alternative positions. It argues, first, that the complaint upon which the warrant of arrest was based was sufficient upon its face to establish probable cause to believe that the offense charged had been committed by appellants. However, argues appellee, even if the complaint was insufficient and the warrant of arrest void, still the actual arrest made was valid and the search and seizure justified as incident to such arrest without warrant.

In fact and in law, appellee appears to be in error.

The arrest was made pursuant to the warrant; the agent who ordered the arrest of respondents in their presence declined at the trial to state that he felt justified in making an arrest without such warrant [R. T. 70].* Whether an arrest made by an officer under a void warrant may as a matter of law be otherwise validated is doubtful. The only case relied on by appellee is *United States v. Gowen,* 40 F. 2d 593 (C. A. 2, 1930) (App. Br. p. 12), but the appellee appears to have overlooked that that case was reversed by the Supreme Court in *Go-Bart Importing Co. v. United States,* 282 U. S.

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*The reference "R. T." is to the Reporter's Transcript of proceedings.

344, the Supreme Court finding it unnecessary to pass on the question (*id.,* 352, 356).*

Appellee also appears to justify the arrests, search and seizure here by what was ultimately found. The Supreme Court has constantly held that a search, whether incident to an arrest or not, cannot be justified by what it turns up. Any other rule would simply subvert the constitutional provision. "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." (*Johnson v. United States,* 333 U. S. 10, 16.) "We have had frequent occasion to point out that a search is not to be made legal by what it turns up." (*United States v. DiRe,* 332 U. S. 581, 595.) What appellee has obscured is that the officers before making the arrests here were required to have reasonable grounds to believe that the respondents had committed or were committing the offense of "knowingly transporting in interstate commerce" for the "purpose of sale" or distribution "obscene" materials. This question must be decided in the positive of the case as it stood before any arrest, search or seizure were made.

The appellee treats the issue of "probable cause" as if it were no different than "suspicion, guess or conjecture". It appears to concede that "probable cause" can only be inferred reasonably from clear and unequivocal evidence demonstrating that the offense has or is being committed; yet appellee does not hesitate to urge that the conclusion

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*The oversight may be due to the change of title in the Supreme Court. Gowen was an employee of the Go-Bart Importing Company. See also the approval by the Supreme Court of the decision in *United States v. Ruroede,* 220 Fed. 210 (*id.,* p. 355) cited in appellant's opening brief here (p. 6).

can be based *solely* upon incompetent testimony—hearsay testimony twice or three times removed. For this position, appellee's only authority appears to be *Costello v. United States,* 350 U. S. 359 (App. Br. p. 12) dealing with the validity of an indictment based on hearsay evidence before a grand jury. In the light of the distinct historical antecedents of the grand jury and the constitutional restrictions on searches and seizures, and the difference in effect between the return of an indictment and the admission of illegally seized evidence to obtain a conviction, appellee's reliance on *Costello* seems misplaced. Moreover, since appellee relies only on hearsay testimony, the sufficiency of the evidence to establish probable cause in this case falls far below the required constitutional standards. The *Branco* and *Binnegar* cases upon which appellee relies (App. Br. pp. 10-11) presented far different factual situations than is presented here, and neither case acquiesced in the vagrant evidentiary standards which appellee is compelled to propose here.

I.

Replying to the Argument That the Fourth Amendment Is Not Applicable Here. (App. Br. pp. 6-9.)

The Fourth Amendment to the Constitution of the United States specifically provides that "the right of the people to be secure in their persons . . . shall not be violated . . . and no warrants shall issue, but upon probable cause . . . particularly describing . . . the persons or things to be seized". The express language of the Amendment leaves no doubt that it covers warrants of arrest as well as search warrants. (*Albrecht v. United States,* 273 U. S. 1, 5; *McGrain v. Dougherty,* 273 U. S.

135-156; *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 357.) "Moreover, that the Fourth Amendment covers warrants of arrest is established". (*Wrightson v. United States,* 222 F. 2d 556, 559 (C. A. D. C., 1955).) If the constitutional safeguards were not available as against an arrest, with or without a warrant, then the search "incident to the arrest" would also be outside the ambit of constitutional scrutiny. "Once those safeguards are gone, the supremacy of force is complete, potentially even if not present factually". (*Wrightson v. United States, supra,* at 559.)

II.

Replying to the Argument That the Arrests Should Be Sustained to Avoid Difficulties of Law Enforcement. (App. Br. pp. 11-12.)

The answer to this argument is embodied in the leading decisions of the Supreme Court of the United States. (See *Gouled v. United States,* 255 U. S. 298, 303; *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 356.) Mr. Justice Jackson, writing for the Court in *United States v. DiRe,* 332 U. S. 581, 595, stated:

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

III.

Replying to the Argument That the Warrant of Arrest, and the Arrests Thereunder, Were Valid. (App. Br. pp. 9-12.)

The appellee, as initially indicated, attempts first to justify the arrests under the warrant of arrest obtained by agent Miner in Seattle. Agent Ralston who ordered and participated in the arrest in Tacoma after being advised that the warrant had issued, stated that if he hadn't had the warrant, he wouldn't know whether or not he would have made the arrest [R. T. 70]. It is plain from Ralston's testimony that he could not testify that he saw appellants commit any crime [R. T. 52-64]. It is equally plain that in making the arrests, the agents could only justify under the warrant of arrest.

Appellee commences its discussion of the issue by asserting that the complaint upon which the warrant of arrest was based [Deft. Ex. B, R. T. 140], although "substantially in the language of the statute", specified, according to appellee, "the operative facts on which the charge is based" (App. Br. p. 9). The complaint is described as sufficient because it included "the place and date of the offense", the "identity of the defendants" and a "description of the material alleged to be obscene" (App. Br. p. 9).

The complaint, it is respectfully submitted, contains not a single "operative fact".* It simply states the barest conclusions of laws devoid of anything but the statutory language (see App. Br. pp. 4-7). The so-called "place

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*In the trial court, the prosecutor conceded that the "operative facts" may "not have been expanded as much as they might have been" [R. T. 141].

and date of the offense" is alleged to be the "Western District of Washington, Southern Division", but the charge against respondents was a violation of 18 U. S. C. 1465, *interstate transportation* of "obscene" materials. There is no *fact* alleged in the complaint that respondents transported such "obscene" materials from one named State to another. (*Cf., Clark v. United States,* 211 Fed. 916 (C. A. 8, 1914).)

Nor is the offense sufficiently described by merely alleging in statutory language the distribution of "obscene" matters, or by the use of the redundant phrase "packets of pictures of a pornographic nature". These are neither a sufficient statement of the *facts* establishing the offense, nor a "description of the materials" alleged to be "obscene" (App. Br. p. 9). In *Roth v. United States,* 354 U. S. 476, the Supreme Court emphasized that it is "vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest" *supra,* at 488. It was stated that "sex and obscenity are not synonymous"; that obscene material is only such material which "deals with sex in a manner appealing to prurient interest" *supra,* at 487.

There is not a single fact *alleged in the complaint* to show that the material allegedly being transported came within the standards aforesaid. The law here involved (18 U. S. C. 1465) does not set forth all the ingredients necessary to state the offense; to save its constitutionality there has been imported another element necessary to charge the offense: material which deals "with sex in a manner appealing to prurient interest". In *United States v. Carll,* 105 U. S. 611, 612, it was stated:

> "In an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute,*

> unless those words of themselves fully, directly, and expressly, *without any uncertainty or ambiguity,* set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, *does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.*" (Emphasis supplied).

In the light of the aforesaid, it appears clear that none of the essential facts constituting the offense charged was contained in the complaint. The complaint contained not only mere conclusions of law, but even failed to state an offense, let alone facts to prove the offense. Appellee concedes that the complaint must satisfy the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure, 18 U. S. C. (App. Br. p. 9). Yet the very language of these rules refutes appellee's position that there has been a compliance with these rules. Rule 3 provides:

> "The complaint is a written statement *of the essential facts constituting the offense charged.* It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States". (Emphasis supplied.)

Rule 4(a) provides:

> *"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it,* a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it . . ." (Emphasis supplied.)

Thus, "probable cause" must appear "from the complaint" itself, and the "essential facts" must be stated in the complaint. In safeguarding fundamental rights, nothing is left to speculation, guess or surmisal, nor to what might have been in the mind of the officer swearing to the complaint. Under these standards, the warrant which issued on the basis of the complaint here was invalid, as was the arrest made thereunder.

IV.

Replying to the Argument That the Arrests Were Valid Without a Warrant. (App. Br. pp. 12-14.)

Appellants do not accept appellee's premise that even if the arrests were invalid because made under a void warrant, the arrests are nevertheless valid as if no warrants were executed.

The record, as we have shown, demonstrates that the arrests were made pursuant to the warrant, and the arresting officer declined to state that he would have made an arrest without one. Nor does the law support appellee's position, apart from the factual situation. Moreover, since a void warrant was obtained, appellee cannot successsfully argue that there was no time to obtain a valid one. Indeed, as appellee's own statement of the case makes plain (App. Br. pp. 2-4), this was not a case of a "swiftly moving vehicle" fleeing from the scene of a crime. The automobile stopped at various "business establishments" [R. T. 67] and packages were allegedly delivered. There was ample time to obtain a valid warrant of arrest, if one was justified, and it was "unreasonable" within the terms of the Fourth Amendment not to obtain one.

If, however, for the purposes of argument, the validity of the arrests are considered as if no warrant was issued, it is submitted that appellee has failed to establish that the arresting officer had "reasonable grounds" for believing that appellants had committed or were committing a violation of 18 U. S. C. 1465. Appellee appears to have misread the standards enunciated in the cases upon which it relies. Thus, in *Carroll v. United States,* 267 U. S. 132, the Court held that before there can be probable cause for search and seizure, by the officers, "the facts and circumstances" must be within their knowledge and of which they had reasonably trustworthy information sufficient "in themselves" to warrant "a man of reasonable caution" in the belief that intoxicating liquor was being transported (p. 162). The Court added:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search" (p. 154).

In *Binnegar v. United States,* 338 U. S. 160, the search was made by an officer who had arrested the defendant several months before for the same offense of transportation, and in addition the Court pointed out that:

> "There was hearsay, *but there was much more.* Indeed, as we have emphasized, the facts derived from Malsted's *personal observations* were sufficient in themselves, without the hearsay concerning general reputation, to sustain his conclusion concerning the illegal character of Binnegar's operations" (p. 172) (emphasis supplied).

In *United States v. Branco,* 189 F. 2d 716 (C. A. 3, 1951), the Court stated:

> "The agent who relies on the summary assertions of his co-agent can acquire therefrom no greater authority than could have been exercised by the co-agent had he been in the arresting agent's position. A telephone message cannot immunize irresponsible investigation" (p. 719).

Appellee cannot dispute that its sole reliance here, to justify the arrest, is upon hearsay testimony. All that the arresting officer saw from his personal observation were "cardboard boxes of a brown or craft-type paper 'filling up' part of the car back of the front seat" [R. T. 56]. Clearly it is not a crime to have the rear of a car filled with boxes, as many an individual and businessman would attest. It would indeed be "intolerable and unreasonable" if police officers could stop every car and subject them to search because the cars were filled with cardboard boxes. Before the arrest was made, the officers had seen no "obscene" material, and therefore had observed no "interstate transportation" of such material. Only after the arrest was made, did one of the officers open up a box and state "you have quite a lot of pictures here, Weise" [R. T. 75].

In the light of the record, the appellee is compelled to rely on what the arresting officer was told in a telephone conversation with other agents prior to the arrest [R. T. 66]. This sole reliance on hearsay has the initial infirmity which stems from the weakness of such evidence. The reason for the rule against the use of hearsay testimony is "that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having a sufficient probative effect

to raise an inference that the fact is as stated" (31 C. J. S., *Evidence,* Section 193, p. 924). The only evidence therefore, upon which appellee relies here to draw the inference of "probable cause" that appellants committed the offense charged is evidence which the law ordinarily deems insufficient to give rise to such an inference.

Moreover, in this case it is conceded that not a single officer anywhere from his own knowledge or personal observation had any evidence that appellants were transporting "obscene" material. Despite the alleged constant surveillance of appellants from Los Angeles to Tacoma; despite the fact that boxes were allegedly delivered to various business establishments; not a single investigation had apparently been made, or if made, disclosed the sale or distribution of any "obscene" material. Appellee concedes even now that of the material seized, some 80% of the matter was not necessarily within the statutory proscription (App. Br. p. 5). The trial court, too, conceded that some of the material was "hardly of a character to be deemed obscene by the standards of this day and age" [R. T. 143]. Thus, the agents had not the slightest evidence prior to the arrests that "obscene" material was contained in the boxes, or that any such material had been transported, sold or distributed in violation of the statute. At most, the agents may have had information to warrant an investigation; they had no probative evidence to justify an arrest, search and seizure.

Appellee's case comes down to this: that the arresting officer was told by phone that some agent had been told by some informant that one of the respondents had told the informant in Los Angeles that his car was loaded with "the real stuff" [R. T. 66], and the agent was told that one of the respondents "had sold obscene photo-

graphs in Seattle a few months before that time at which time he was investigated but there was no proof of interstate transportation" [R. T. 67]. It is submitted that this was hardly the quality of proof necessary to establish reasonable grounds for believing that appellants had committed the offense for which they were convicted. The hearsay of the informant was thrice removed. The reliability of the informant, or the reasons for relying upon him were not shown. The alleged statement was plainly equivocal and ambiguous. The officer could not know whether the expression allegedly used was merely that which usually appears in newspapers and magazines exploiting some motion picture or novel or whether it was actually intended to constitute an admission that "obscene" material within the purview of the law was stored in the car. As to such alleged oral admissions, it has been stated by a learned authority: "But there is a general distrust of testimony reporting any extrajudicial *oral statements* alleged to have been made, including a party's admissions". (Wigmore, *Evidence* (3rd ed), IV, Section 1056, p. 17.) Nor was this vague and tenuous hearsay statement in any way buttressed by the stock reliance on reputation testimony.

In essence, the officers in this case had no evidence that the appellants were transporting "obscene" material in interstate commerce; no investigation was made to determine that fact; the officers acted solely on suspicion created by hearsay information; the warrant they obtained was invalid, and the attempt now to disregard it is fruitless, whether the arrests be considered pursuant to the warrant or without it. Since the arrests were purportedly made under federal authority (18 U. S. C. 3052) and the Federal Rules of Criminal Procedure and

the conviction obtained under a federal statute in the federal court, the failure to meet federal constitutional and statutory standards cannot be avoided by reference to state law (App. Br. p. 14). (*Constitution of the United States,* Art. VI, cl. 2 (Supremacy clause).)

Conclusion.

The judgments of conviction should be reversed. The arrests, search and seizure upon which the convictions were based were in violation of the provisions of the Fourth Amendment, and the convictions thus obtained deprive appellants of their liberty without due process of law in violation of the due process provisions of the Fifth Amendment. Judgments so obtained are inconsistent with the true administration of criminal justice in the Courts of the United States.

Respectfully submitted,

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